

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
ex rel. TERESA ROSS

Plaintiff,

v.

GROUP HEALTH COOPERATIVE, INDEPENDENT
HEALTH CORPORATION, DxID LLC, DR. JOHN
HAUGHTON, BETSY GAFFNEY & INDEPENDENT
HEALTH ASSOCIATION,

Defendants.



12-CV-0299(S)
UNDER SEAL

**MEMORANDUM IN SUPPORT OF THE UNITED STATES’
EX PARTE APPLICATION FOR AN EXTENSION OF TIME TO CONSIDER
ELECTION TO INTERVENE**

The United States of America submits this Memorandum in support of its application for an Order under the False Claims Act, as amended, 31 U.S.C. §3730(b)(3), for a three month extension, from May 10, 2019, up to and including August 12, 2019, of the period in which to determine whether to intervene in the above-captioned *qui tam* action, and during which time the Amended Complaint and all other related pleadings and filings shall remain under seal, except as previously ordered by this Court. Relator Teresa Ross, corporate defendants Independent Health Association, (“IHA”), Independent Health Corporation (“IHC”) (collectively “IH”), and DxID, and individual defendants Betsy Gaffney and John Haughton, support the United States request for an extension of the seal.¹

¹ Pursuant to the Court’s previous Orders partially lifting the seal, the United States has informed all of the defendants of the existence of the *qui tam* suit. Defendant Group Health Cooperative (“GHC”) has asked the United States to represent to the Court that it takes no position with regard to the Government’s request for an extension of the seal.

Government counsel are mindful of the fact that the Court's November 12, 2018, Order (Docket No. 53) stated that no further extensions of the seal would be granted, and have worked diligently since that Order was issued to conclude the Government's investigation. Since that Order was issued, the Government has conducted CID examinations, exchanged data and information with counsel for GHC, participated in and responded to a presentation by GHC, worked with counsel for IH and DxID to arrange for witness interviews, and provided information and assistance to IH and DxID in connection with their efforts to produce a self-audit to the United States.

During this same period, however, a number of unanticipated developments have hampered the Government's ability to make an intervention determination in this matter. Those events include the following:

- 1) The five week government shutdown from December 21, 2018 through January 25, 2019, caused members of the government team to be furloughed with very limited opportunity to work on this case during that time period;
- 2) DxID witnesses represented by Timothy Hoover, Esq. refused to confirm dates for CID examinations that are necessary for the government to conclude its investigation;
- 3) four of the six DxID witnesses obtained new counsel (Mark Molloy, Esq.), and the Government was first informed of this change at the end of January;
- 4) all six DxID witnesses represented by Mr. Hoover and Mr. Molloy filed a petition to quash the CIDs with this Court on March 5, 2019 resulting in government resources being diverted to litigate that issue;
- 5) despite multiple attempts by the Government to resolve that dispute, the DxID witnesses did not agree until April 29, 2019, to any of the Government's proposals that

would allow the CIDs to go forward;

6) IH and DxID introduced new co-counsel to the Government team on April 24, 2019; and

7) IH and DxID have reportedly encountered delays in the production of audit results to the Government for review and analysis.

In light of all of these developments, the United States, with relator and defendants' concurrence, respectfully requests a three month extension of the intervention deadline and seal in this matter to allow the United States to conclude its investigation, and to afford all of the parties the opportunity to pursue a negotiated resolution.

If the Court has questions regarding this request, Government counsel are available for an in-person or telephonic conference at the Court's convenience.

I. STATUTORY BACKGROUND

This case arises under the *qui tam* provisions of the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. The FCA provides that a private person, known as a "relator," may bring a civil action, on behalf of himself and the United States, for false or fraudulent claims made to the United States. After receipt of the complaint and material information from a relator, the United States has at least 60 days to elect to intervene in the action. 31 U.S.C. § 3730(b)(2). During that time, the action should remain under seal. *Id.*

Congress contemplated that the United States might require additional time within which to make an intervention decision, and that such extensions should be granted upon a showing of "good cause." The relevant portions of the Act provide:

A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall

be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

The Government may, for good cause shown, move the court for extensions of time during which the complaint remains under seal under [the preceding paragraph]. 31 U.S.C. §§ 3730(b)(2) and (b)(3) (emphasis added).

Thus, upon a showing of good cause, the FCA allows for extensions of the intervention and seal periods.

II. DISCUSSION

Relator Theresa Ross is a former employee of defendant GHC. Under Medicare Part C (also known as “Medicare Advantage”) the Center for Medicare and Medicaid Services (CMS) pays private insurers, such as GHC and IH, a set amount “per member per month” to cover the actual costs of each beneficiary’s care. CMS determines these monthly amounts through a complicated formula, known as “risk adjustment,” that takes into account the beneficiaries’ diagnoses from a previous year. Relator, the former director of Risk Adjustment Services at GHC, alleges that GHC and IH, with the assistance of DxID, submitted false diagnoses to Medicare in order to increase the risk adjustment payments that they received from the Government.

The complexity of the Medicare Advantage program and the risk adjustment process has contributed to the length of the time that it has taken the United States to investigate this matter. However, the Government has made substantial progress in its investigation and has significant concerns that defendants may have violated the FCA.

For the reasons detailed above, however, the United States has not been able to make as much progress in the past six months as it had hoped. If the current extension request is granted the United States will make every effort to conclude its investigation and to continue the parties’

efforts to reach a negotiated resolution of this matter. The United States has recently provided an initial basis for settlement discussions to one defendant and will seek to make progress in the same regard with the other defendants during any further extension of the seal.

In light of all of these considerations, the United States submits that good cause exists for a three month extension of the seal and the intervention period to allow the United States to conclude its investigation, and for the parties to explore the possibility of a negotiated resolution.

III. CONCLUSION


Accordingly, the United States respectfully requests that the Court grant this application for an extension of time, to and including August 12, 2019, during which the United States may make its intervention decision and during which this action remains under seal. A proposed order is attached for the Court's consideration. If the Court deems it helpful, counsel for the United States would welcome the opportunity to answer any further questions the Court may have at an in-person or telephonic hearing.

DATED: Buffalo, New York, May 6, 2019.

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